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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION

Rapporteur: Mr. Peter Kabatsi

CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

ADDENDUM

CONTENTS

	Paragraphs	Page
B. Consideration of the topic at the present session . . .		
1. Draft articles adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission	1 - 2	
2. The tenth report of the Special Rapporteur submitted at the present session	3 - 4	
(a) Prevention ex-post	5 - 6	
(b) Liability	7	
(i) Relationship between State Liability and civil liability	8 - 10	
(ii) Civil Liability	11	

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CONTENTS (continued)

	Paragraphs	Page
a. Liability of the operator	12	
b. Obligation to purchase insurance . .	13	
c. Competent court	14	
d. Non-discrimination	15	
e. Causality	16	
f. Enforcement of judgements	17	
g. Exceptions to liability	18	
h. Statute of limitation	19	
(c) Procedural channels	20	

B. Consideration of the topic at the present session

1. Draft articles adopted by the Drafting Committee at the forty-fifth and the forty-sixth sessions of the Commission

1. At its 2362nd to 2366th meetings held between 8 and 13 July 1994 the Commission considered and provisionally adopted article 1 (Scope of the present articles), paragraphs (a), (b) and (c) of article 2 (Use of terms), article 11 (Prior authorization), article 12 (Risk assessment), article 13 (Unauthorized activities), article 14 (Measures to prevent or minimize the risk), article 14 bis [20 bis] (Non-transference of risk), article 15 (Notification and information), article 16 (Exchange of information), article 16 bis (Information to the public), article 17 (National security and industrial secrets), article 18 (Consultations on preventive measures), article 19 (Rights of the State likely to be affected) and article 20 (Factors involved in an equitable balance of interests) referred to it the Drafting Committee at the forty-fifth session in 1993 and at the present session. 1/ The text of those articles and the commentaries thereto are reproduced in Section C.2 below.

2. In the course of the adoption of these articles, the issue was raised that the articles did not address the special situation of the developing countries directly. It was noted that the Commission intended to address that issue in a provision which might be placed in the chapter on general provisions and that would be applicable to all the articles on this topic. It was further noted that the Commission had not yet decided on whether any role should be anticipated for international organizations. If the Commission decides later to require assistance of international organizations in such matters as assessment of transboundary impact of an activity, or making notification, etc., then the relevant articles will be reconsidered.

2. The tenth report of the Special Rapporteur submitted at the present session

3. At the present session, the Commission had before it the Special Rapporteur's tenth report (A/CN.4/459) which was introduced, at the Commission's

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1/ Draft articles 1, 2, 11, 12 and 14 were adopted by the Drafting Committee at the forty-fifth session in 1993.

2351st meeting held on 10 June 1994. The Commission decided to consider the report at its next session.

4. The tenth report dealt with three issues: prevention ex-post, State liability and civil liability. A summary of the tenth report as introduced by the Special Rapporteur is contained in paragraphs 5 to 20 below.

(a) Prevention ex-post

5. The Special Rapporteur recalled the discussion held in the Commission at its last session, where a substantial number of members expressed the view that prevention ex-post, namely measures adopted after the occurrence of an accident to prevent or minimize its transboundary harmful effects should not be considered as preventive measures, but instead dealt with in the context of measures of reparation. The Special Rapporteur found that view both incompatible with the approach taken in conceptualizing the topic and with the existing legal instruments dealing with similar issues. He explained that the approach to the topic followed a factual sequence; namely, an incident may ignite a series of cause and effect relationships which at the end may result in transboundary harm. Therefore any measure intended to prevent or intercept that chain of cause and effect relationship which would prevent or reduce the harmful transboundary effect was per se of a preventive character. It is thus clear that the concept of prevention is applicable both to measures taken to avoid incidents that can lead to transboundary harm and to measures taken to prevent the effects of the incident from reaching their full potential. This conceptualization was also supported, he pointed out, by the existing legal instruments dealing with issues of prevention and of liability of transboundary harm. He referred to a number of legal instruments dealing with prevention of environmental harm or with civil liability regimes where measures referred to were identified as preventive. 2/

2/ See Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, states in article 2, paragraph 9 that "'Preventive measures' means any reasonable measures taken by any person after an incident has occurred to prevent or minimize loss or damage as referred to in ..."; Convention on Environmental Impact Assessment in a Transboundary Context, of 25 February 1991, article 2, paragraph (1) states "The Parties shall, ... take ... measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities."; Convention on the Transboundary Effects of Industrial Accidents of 17 March 1992 states in article 3, paragraph 1 that "The

The Special Rapporteur explained that if the Commission still wished to refer to preventive measures as only those taken prior to the occurrence of an accident, another term such as, for example, response measures should be used for measures of prevention ex-post since such measures cannot factually and methodologically be dealt with within the sphere of reparation.

6. As regards who should take such response measures, the Special Rapporteur believed that it depended on the circumstances. In some situations, such measures should be taken by the State when there is a need for using massive State apparatus such as the national guards, fire-fighters, etc., in emergency situations and in some other circumstances by the private parties themselves. In the light of the foregoing, the Special Rapporteur proposed two new paragraphs to be placed in article 2 "use of terms" defining "response measures" and "damage". 3/

Parties shall, ..., take appropriate measures ..., to protect human beings and the environment by reducing their frequency and severity and by mitigating their effects. To this end, preventive, preparedness and response measures, including restoration measures, shall be applied."; Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources of ... defines pollution damage in article 1, paragraph 6 as including in addition to the loss or damage outside the installation caused by contamination resulting from the escape or discharge of oil from the installation, also "the cost of preventive measures". And paragraph 7 of the same Convention defines preventive measures as "any reasonable measures taken by any person in relation to a particular incident to prevent or minimize pollution damage."; Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels of ... uses a similar formulation in article 1, paragraphs 10 and 11 defining the concept of damage, which includes the cost of preventive measures. The United Nations Convention on the Law of Sea of ... also in referring to the concept of prevention in Part XII uses such wording as "prevent, reduce and control" of damage. Emphasis in the above Conventions were added.

3/ The new paragraphs read as follows:

"Use of terms

For the purposes of the present articles:

(e) 'Response measures' means any reasonable measures taken by any person in relation to a particular incident to prevent or minimize transboundary harm.

(b) Liability

7. The Special Rapporteur noted that his entire ninth and part of his tenth reports dealt with the issue of prevention, both in terms of prevention ex ante and prevention ex post. Following the recommendation of the Commission, he embarked, in the remaining part of the tenth report, on the examination of the issue of liability. Referring to the broad meaning of the concept of liability, he noted that, at this time, he did not wish to examine the content of the remedial measures, which could be other than monetary compensation. At this time, he dealt only with attribution of liability and some other aspects connected with that attribution.

(i) Relationship between State liability and Civil liability

8. The report reviewed four possible ways in which a regime of State liability and civil liability could be envisaged. First, to leave the State completely out of the liability regime and provide only for civil liability of the operator. In such regimes no duty or obligation is imposed on States. A prime example of this type of regime, he noted, was the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment drafted by the Council of Europe, where no obligations of prevention or otherwise were anticipated for States. Second, to make the State bear both strict liability and responsibility for the wrongful act. Here, the State becomes the only actor relevant in the entire regime. The prime example of this type of regime is the Convention on International Liability for Damage Caused by Space Objects where the State is absolutely liable if the damage is caused on the surface of the earth or to aircraft in flight as well as liable for damage caused due to its fault to a space object of another launching State. Third, the operator bears strict liability for damage caused, but the State also bears strict liability but only to the extent of the portion of compensation not satisfied by the private operator. In this regime, State liability is subsidiary to that of the operator.

(x) The harm referred to in subparagraph (y) includes the cost of preventive measures wherever taken, as well as any further harm that such measures may have caused."

The letters "x" and "y" represent the letters that will identify the relevant subparagraphs once article 2 has been finalized. A/CN.4/459, p. 8, para. 22.

The prime examples of this type of regime are, in his opinion, the conventions for civil liability for nuclear accidents. Fourth, the operator bears strict liability for damage caused and the State bears subsidiary responsibility for the portion of compensation not satisfied by the operator, provided that the State has failed to comply with its obligation under the regime and that such failure could be linked to the damage caused. The draft protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, is an example of this type of regime. Under this draft Protocol, the private operator bears strict liability for damage, the State bears subsidiary responsibility for that portion of the damage not satisfied by the private operator. However, State responsibility in this regime is conditioned upon the proof that the State had failed to fulfil one of its obligations under the draft Protocol and that, had it not been for this failure, the damage would not have occurred. 4/

9. The Special Rapporteur viewed, the first and second regimes as inappropriate for this topic. The first regime is not relevant to the present topic and the second regime which holds the State fully liable, is only justified in a convention dealing with space objects because space activities were considered by the negotiators of that convention as reserved to States. The third regime seemed appropriate for some of the activities involved in this topic where a disastrous harm might render a private operator unable to pay full compensation and therefore the subsidiary liability of a State would guarantee compensation to innocent victims. He noted that this regime could be modified to alleviate subsidiary State liability by, for example, creating a consortium of all States parties to the Convention, or private operators of the States parties to bear the subsidiary liability. As regards the fourth regime, the Special Rapporteur expressed the concern that it would be unreasonable to require the victims, often private individuals, to establish that a State has violated its obligation under the convention, since such a task usually requires access to information and the type of evidence, not easily available to private individuals.

4/ See paragraphs 5 and 7 of the draft protocol, document UNEP/CHW.1/WG.1/1/3.

10. The Special Rapporteur submitted two alternative forms for State liability under the regime of this topic. Under one alternative, even though he did not consider it entirely suited to the present topic, the State would bear subsidiary liability subject to two conditions: that the harm caused by the operator was due to failure of the State to comply with its obligation under the convention; and the liability of the State was limited to that

portion of compensation not satisfied by the operator. 5/ The other alternative is based on the civil liability of the operator with no involvement of the State to pay compensation for transboundary harm caused by an activity. However, the State remains obligated for only failure to take preventive measures and the consequences of such failure already laid down in part two of State responsibility draft articles, namely, cessation, restitution in kind,

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5/ The Special Rapporteur submitted two alternatives for this situation. The alternative texts read as follows:

"State liability

Article 21

Alternative A:

Residual liability for a breach by the State

Harm which would not have occurred if the State of origin had fulfilled its obligations of prevention in respect of the activities referred to in article 1 shall entail the liability of the State of origin. Such liability shall be limited to that portion of the compensation which cannot be satisfied by applying the provisions on civil liability set forth herein.

Alternative B:

The State of origin shall in no case be liable for compensation in respect of harm caused by incidents arising from the activities referred to in article 1."

See document A/CN.4/459, p. 13, para. 30.

compensation, satisfaction and guarantees of non-repetition. 6/ For example, if the State of origin allows an activity within the scope of article 1 to be carried out without prior authorization, notification, etc., it would not be complying with its obligation of due diligence. If in such a case, transboundary harm occurs, the operator will be strictly liable, but the State will be responsible only for the other consequences of the breach of its due diligence obligation, i.e., responsible for its wrongful act.

(ii) Civil liability

11. The Special Rapporteur noted that international conventions on civil liability in respect of hazardous activities have, in general, imposed strict liability, primarily on the ground that the victims should promptly be compensated. The report enumerated the features common to the existing civil liability regimes: (i) the operator who bears liability is clearly identified and when there is more than one operator, their liability is joint and several; (ii) the operator is invariably obliged to take insurance or provide some financial guarantee; (iii) where possible, compensation funds are established; (iv) for the better functioning of the system, the principle of non-discrimination applies, namely the State of origin accords, in its domestic courts, to non-nationals, the same protection accorded to nationals; (v) in all matters not directly covered by the convention, the law of the competent jurisdiction applies, provided that such law is consistent with provisions of the convention; (vi) judgements enforceable in one jurisdiction are also enforceable in all other jurisdictions parties to the convention, except where otherwise

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6/ The additional article reads as follows:

"Article A

International State liability

The consequences of a breach by the State of origin of the obligations of prevention laid down in these articles shall be those consequences established by international law for the breach of international obligations."

See document A/CN.4/459, p. 17, para. 41.

provided; and (vii) monetary compensations are awarded in the currency preferred by the beneficiary of the award.

a. Liability of the operator

12. One of the important characteristics of civil liability regimes, the Special Rapporteur noted, is the clear identification of the party who will bear the liability for any harm caused. This clarity has the advantage of not only putting the potentially liable parties on notice and making them do their best to avoid causing harm, but it also facilitates redress of the injured party, in case of harm. He stated that a review of civil liability regimes shows that, in general, liability is channelled through the operator, on the grounds that the operator: (a) is in control of the activity; (b) is in the best position to avoid causing harm; and (c) is the primary beneficiary of the operation and should therefore bear the cost of the operation to others. Inspired by the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment which is perhaps the most relevant to this topic because of its general character, the Special Rapporteur proposed provisions for defining the operator and its liability. Accordingly, the operator is the person who has "control" over the activity. The operator bears liability for the significant transboundary harm caused by its activity during the period in which he exercises control over the activity. If there is more than one operator, liability is joint and several unless the operator proves that he has been liable only for part of the harm, in which case he will be liable only for that part of the harm. 7/

7/ The texts proposed by the Special Rapporteur read as follows:

"Article 2

Use of terms

...

(...) 'Operator' means the person who exercises the control of an activity referred to in article 1.

...

Article A

Liability of the operator

b. Obligation to purchase insurance

13. Relying on existing civil liability conventions, the Special Rapporteur proposed provisions requiring financial guarantee of the operator conducting activities covered by this topic. 8/ These provisions would leave it up to the

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The operator of an activity referred to in article 1 shall be liable for all significant transboundary harm caused by such activity.

(a) In the case of continuous occurrences, or a series of occurrences having the same origin, operators liable under the paragraph above shall be held jointly and severally liable.

(b) Where the operator proves that during the period of the commission of the continuous occurrence in respect of which he is liable only a part of the damage was caused, he shall be liable for that part.

(c) Where the operator proves that the occurrence in a series of occurrences having the same origin for which he is liable had caused only a part of the damage, he shall be held liable for that part.

Article B

Recourse against third parties

No provision of these articles shall restrict the right of recourse which the law of the competent jurisdiction grants to the operator against any third party."

Ibid., p. 22 paras. 56-57.

8/ The texts proposed by the Special Rapporteur read as follows:

"Article C

Financial securities or insurance

In order to cover the liability provided for in these articles, States of origin shall, where appropriate, require operators engaged in dangerous activities in their or otherwise under their jurisdiction or control to participate in a financial security scheme or to provide other financial guarantees within such limits as shall be determined by the authorities of such States, in accordance with the assessment of the risk involved in the activity in question and the conditions established in their internal law.

Article D

States of origin to determine through their domestic law how and for what amount financial guarantees should be made. Some States may require purchase of insurance, while others may set up other financial schemes in which the operators would participate. The amount of such guarantee would be determined by the State of origin depending upon the risk an activity may pose. Where there are financial guarantors, claims for compensation may be brought directly against them.

c. Competent court

14. The Special Rapporteur noted that various jurisdictions have been identified in the existing civil liability conventions as competent to deal with claims. Those jurisdictions include, the courts of the place: (a) where the harm occurs; (b) where the operator resides; (c) where the injured party resides; or (d) where preventive measures were supposed to have been taken. Each of these jurisdictions had advantages in terms of gathering evidence and convenience of the claimant or the defendant. Accordingly, the text he proposed would provide only for the first three jurisdictions. 9/

d. Non-discrimination

Action brought directly against an insurer or financial guarantor

An action for compensation may be brought directly against the insurer or another person who has provided the financial security referred to in the article above."

Ibid., p. 24, para. 61.

9/ The text proposed by the Special Rapporteur reads as follows:

"Competent court

Actions for compensation of damages attaching to the civil liability of the operator may be brought only in the competent courts of a State party that is either the affected State, the State of origin or the State where the liable operator has his domicile or residence or principal place of business."

See document A/CN.4/459, p. 25, para. 64.

15. The Special Rapporteur noted that in order for civil liability regimes to be effective, the appropriate jurisdictions should grant equal treatment before the law between nationals and non-nationals or residents and non-residents. Therefore, States parties might have to remove any obstacles which might lead to such discrimination. Such a provision, in his view, is necessary for these articles as well. He stated that the principle established by article 10 on non-discrimination may be considered by the Commission to be sufficient to satisfy this condition. If not, a specific article with similar drafting could be included in this part of the articles. 10/

e. Causality

16. Following the Council of Europe Convention, the report proposed that a court, when considering evidence of a causal link between activities and consequences, must take due account of the increased danger of damage inherent to a specific activity. The article proposed in the report, however, does not create a presumption of causality between the incident and harm. 11/

10/ The text proposed by the Special Rapporteur reads as follows:

"Article E

Domestic remedies

The Parties shall provide in their domestic law for judicial remedies that allow for prompt and adequate compensation or other relief for the harm caused by the activities referred to in article 1.

Article F

Application of national law

The competent courts shall apply their national law in all matters of substance or procedure not specifically dealt with in these articles."

Ibid., p. 26, para. 67.

11/ The text of the article proposed by the Special Rapporteur reads as follows:

"Article H

f. Enforcement of judgements

17. One of the elements essential in any effective civil liability regime is the possibility to have the judgement rendered in one jurisdiction enforced in another jurisdiction. Otherwise, the effort of a private party to seek redress in domestic courts could be futile. That is the reason for the existence of a provision on enforcement of judgements in the existing civil liability conventions. However, some exceptions are provided. They include, for example, fraud, violation of procedural fairness, namely when the party against whom the judgement was rendered was not given sufficient notice to prepare for defence; and a judgement against the public policy of the State where enforcement is sought. These provisions require that the party seeking enforcement must comply with the procedural laws of the State in question for such enforcement. On the basis of the foregoing the Special Rapporteur proposed a provision on enforcement of judgements. 12/

When considering evidence of the causal link between the incident and the harm, the court shall take due account of the increased danger of causing such harm inherent in the dangerous activity."

See document A/CN.4/459, p. 28, para. 70.

12/ The text of the proposed article reads as follows:

"Article I

Enforceability of the judgement

1. Where the final judgements entered by the competent court are enforceable under the laws applied by such court, they shall be recognized in the territory of any other Contracting Party unless:

(a) The judgement was obtained by fraud;

(b) Reasonable advance notice of the claim to enable the defendant to present his case under appropriate conditions was not given;

(c) The judgement was contrary to the public policy of the State in which recognition is sought, or did not accord with the fundamental standards of justice;

(d) The judgement was irreconcilable with an earlier judgement given in the State in which recognition is sought on a claim on the same subject

g. Exceptions to liability

18. Grounds for exceptions to liability, in the existing civil liability conventions, depend upon their subject-matter and the extent of the risk they pose to others and to the environment. The following have been identified as grounds of exceptions to liability: armed conflict; unforeseeable natural phenomenon of exceptional and irresistible character; a result of the wrongful and intentional act of a third party; and gross negligence of the injured party. In the view of the Special Rapporteur, these grounds are equally reasonable as exceptions to liability in respect of the type of activities

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and between the same parties.

2. A judgement recognized under the paragraph above shall be enforced in any of the Member States as soon as the formalities required by the Member State in enforcement is being sought have been met. No further review of the merits of the case shall be permitted."

See document A/CN.4/459, p. 30, para. 76.

covered by this topic and accordingly he proposed an article. 13/ As regards exceptions to State responsibility for wrongful acts, namely non-compliance with preventive provisions, the grounds for exception are those contained in Part One of the State responsibility topic.

h. Statute of limitation

19. Various timetables are provided for in different civil liability conventions to serve as statutes of limitations. They run from one year, under the Convention on International Liability for Damage Caused by Space Objects, to 10 years under the 1963 Vienna Convention on Civil Liability for Nuclear Damage. These timetables were set on the basis of various considerations such as, for example, the time within which harm may become visible and identifiable, the time that might reasonably be necessary to establish a casual relationship between harm and a particular activity, etc. In the view of the Special Rapporteur, since the type of activities covered by this topic were more similar to those covered by the Convention on Civil Liability Resulting from Activities Dangerous to the Environment, the three year statute of limitation provided therein would also be appropriate in respect of claims for compensation under this topic. In no case, may a procedure be instituted after 30 years from the date of the

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13/ The text of the proposed article reads as follows:

"Article J

Exceptions

1. The operator shall not be liable:

(a) If the harm was directly attributable to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) If the harm was wholly caused by an act or omission done with the intent to cause harm by a third party.

2. If the operator proves that the harm resulted wholly or partially either from an act or omission by the person who suffered the harm, or from the negligence of that person, the operator may be exonerated wholly or partially from his liability to such person."

Ibid., p. 34, para. 83.

accident. Accordingly, he proposed an article to that effect. 14/ The article would also take into account whether the activity is of a continuous nature or consists of a series of activities. In his view, the three year statute of limitation should apply to both State and operator liability.

(c) Procedural channels

20. The type of controversies which may arise in respect of the activities covered by these articles will, in most cases, place an individual against a State. For example, if the regime of liability provides for a subsidiary liability of the State, the State may have to appear before the court of another State to defend itself. The report reviewed various possibilities, but found most appropriate the proposal by the Netherlands in the International Atomic Energy Agency Standing Committee to the effect of creating a single forum like a mixed claims commission where all kinds of claims involving States and private individuals could be heard and adjudicated.

14/ The text of the proposed article reads as follows:

"Article K

Time-limits

Proceedings in respect of liability under these articles shall lapse after a period of three years from the date on which the claimant learned, or could reasonably have been expected to have learned, of the harm and of the identity of the operator or of the State of origin in the case of State liability. No proceedings may be instituted once 30 years have elapsed since the date of the incident which caused the harm. Where the incident consisted of a continuous occurrence, the periods in question shall run from the date on which the incident began and where it consisted of a series of occurrences having the same origin, the periods in question shall run from the date of the last occurrence."

See document A/CN.4/459, p. 36, para. 88.